INTERFOOD SDN BHD

v.

ARTHUR ANDERSEN & CO & ANOR

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[CIVIL SUIT NO: MT3-22-137-1999]
15 JUNE 2001

CIVIL PROCEDURE: *Injunction - Anton Piller order - Preservation of documents - Documents to be used in trial - Whether there was real threat that documents would be altered, removed or destroyed - Evidence of tampering of documents by defendant - Whether fear justified - Whether order properly granted*

The plaintiff had obtained an Anton Piller order ('the order') against the first defendant and had taken possession of certain documents belonging to the latter. By encl. 7 herein, the first defendant applied to set aside the order. Three specific grounds were proffered by the first defendant, namely, that the plaintiff, in obtaining the order: (i) had not disclosed that the documents would be used by the first defendant in a pending suit in Shah Alam High Court ('suit MT3-22'); (ii) had not disclosed that the same would be used by the first defendant in the present suit and (iii) had not established a proper case for the order. In answer to encl. 7, the plaintiff applied for an order to preserve the documents in the custody of its solicitors, or alternatively of the Senior Assistant Registrar, until the trial of the action.

Before the learned judge, the plaintiff argued that the raising of suit MT3-22 by the defendant was misconceived, as the plaintiff therein was an individual whereas the plaintiff in the present case was a company and a separate legal entity. It further submitted that the order was properly granted, as the first defendant had tampered with the documents even before the order was granted.

The facts also showed that the plaintiff, *vide* encl. A41, had earlier applied to the court to have the present suit and suit MT3-22 heard together. That application was however opposed by the first defendant on the grounds, *inter alia*, that: (i) the plaintiffs in the two cases were separate entities; and (ii) the defences pleaded were different. This being the case, a question arose as to whether the order aforesaid ought to be set aside by the court.

Held:

[1] Suit MT3-22 was commenced by an individual against the first defendant and all proceedings and applications in that suit and the present one had been conducted distinctly and separately. The plaintiff here was not a party

or privy to suit MT3-22 and the solicitors handling that suit was also not the same solicitors of the plaintiff herein. There is therefore no reason for treating these two suits as one and the same suit and the plaintiff, consequently, has no duty to disclose what has transpired in suit MT3-22. (pp 338 i & 339 a-b)

[2] The first defendant had taken an ambivalent stand in the present suit *vis-a-vis* the plaintiff's application in encl. A41. The ambivalent stand taken by the first defendant must constitute a self rebuttal and self-demolition of grounds (i) and (ii) raised by the first defendant in encl. 7 herein. (p 339 e)

[3] The plaintiff was justifiably fearful that the first defendant would alter, remove or destroy the documents seized. Not only was the plaintiff's fear justified, such fear had also metamorphosed to reality as there were actual instances of the first defendant's alteration, tampering and doctoring of the documents seized. (p 340 d)

[Plaintiff's principal application allowed.]

Case(s) referred to:
Yousif v. Salama [1980] 3 All ER 405 ***(refd)***

For the plaintiff - Gideon Tan; M/s Gideon Tan Razali Zaini
For the 1st defendant - Cecil Abraham (Gurmeet Kaur Sidhu & Nad Segaram); M/s Shearn Delamore & Co

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:
There are two applications, *viz* encls. (7) and (10) before me. In view of the fact that these two applications are closely connected, I consider it appropriate to deal with them together.

Enclosure (7) is an application by the first defendant by way of summons in chambers for the following orders:

(1) that the Anton Piller order dated 9 March 1999 ("the Anton Piller order") obtained against the first defendant be set aside;

(2) that all working papers, notes, documents, files and any other documents belonging to the first defendant ("the documents") and any copies made thereof which have been obtained by and presently in the possession of the the plaintiff, its agents, workers and/or solicitors pursuant to the Anton Piller order, be returned to the first defendant and/or its solicitors within 48 hours of this order;

(3) that in respect of damages suffered by the first defendant by reason and as a result of the Anton Piller order, an inquiry forthwith be held by the senior assistant registrar;

(4) costs of and occasioned by this application be paid by the plaintiff to the first defendant as taxed; and

(5) such further or other relief as this court deems fit and just.

Enclosure (7) specifically states the grounds in support thereof as follows:

(i) that the plaintiff has failed to disclose that the documents seized herein will be used and relied upon by the first defendant in another suit No. MT3-22-1203-1998 pending before the High Court of Shah Alam for, but not limited to, the purposes of discovery of documents pursuant to an order of the court dated 18 November 1998;

(ii) that the documents will be used and relied upon by the first defendant in formulating its defence in the present suit and discovery of the documents will in due course be made available to the plaintiff; and

(iii) that the plaintiff's affidavit affirmed by Koh Kim Chui on 9 January 1999 in support of the application for the Anton Piller order has failed to establish a case appropriate for an Anton Piller order, in that the plaintiff has failed to adduce any form of evidence of any real threat that the first defendant will alter, remove and/or destroy the documents.

This application is supported by the affidavit of Ravandaran Thangeveloo affirmed on 16 March 1999 and filed herein.

Since encl. (7) has specifically stated the aforesaid three grounds, I shall consider the relevant affidavits and exhibits together with the respective submissions of the learned counsel for the first defendant and for the plaintiff by specific reference to all these three grounds, on which my judgment would be wholly and exclusively focussed.

Enclosure (10) is indeed a counter-application by way of summons in chambers filed by the plaintiff for an order to preserve the documents in the safe custody of the plaintiff's solicitors until the trial of the action herein, with access to the first defendant's solicitors for the purposes of inspection at the premises of the plaintiffs solicitors by giving one day's notice to the plaintiff's solicitors. There is also an alternative prayer for the documents to be preserved in the safe custody of the senior assistant registrar, with access to the first defendant's solicitors by making an appointment with the said registrar.

General Observations

Elaborate bundles of initial and final written submissions containing about 100 pages, together with several bundles of authorities have been filed by Encik Cecil Abraham, Cik Gurmeet Kaur Sidhu and Encik Nad Segaram, learned counsel for the first defendant relating to a host of matters or issues which in my view were obviously beyond the three grounds of application which had been specifically set out by learned counsel for the first defendant in encl. (7). Equally lengthy written submissions in reply and voluminous bundles of authorities have been filed by Encik Gideon Tan, learned counsel for the plaintiff. Again, these written submissions have also travelled far and wide, extending to areas which are outside the aforesaid three grounds. However, for the purposes of this judgment, I shall only distill from the written submissions the pertinent points covering the aforesaid three grounds, which provide the compass demonstrating the direction or specific and exclusive area for determination by this court.

Given the common subject matter constituting the controversy in encls. (7) and (10), the decision of the court in encl. (7) would automatically provide an answer to encl. (10) and so these two enclosures may be determined simultaneously.

Submission For First Defendant

Grounds (i) and (ii) as formulated in the first defendant's application and written submissions in support of encl. (7) demonstrate a distinct identity of closely connected issues *viz* they refer to the plaintiff's failure to disclose that the documents seized would be used and relied upon by the first defendant herein and also in Shah Alam High Court Suit No. MT3-22-1203-1998 and that these documents would in due course be made available to the plaintiff. It was argued for the first defendant that the plaintiff has failed to disclose exhs. R1, R2 and R3 *viz* the application made in MT3-22-1203-1998 and the two orders of the court. In respect of these two grounds, it was further submitted for the first defendant that the plaintiff's case would have merited an order for delivering up of documents as opposed to an Anton Piller order.

On ground (iii), that the plaintiff has failed to establish that there is "a real possibility" that the first defendant may alter, remove and/or destroy the documents, it was contended for the first defendant that there appeared to have been only a feeble attempt by the plaintiff, in paras. 12 and 13 of encl. (2) ie, the affidavit in support of the plaintiff's application to obtain the Anton Piller order, in addressing this point by stating that there is a distinct possibility that the papers or documents sought would be altered. In the circumstances, the said learned counsel for the first defendant argued that, without any independent facts or averments, the plaintiff has hence fallen short of the requirement to show a "real" as opposed to an "imagined" possibility or mere "speculation".

Submission For Plaintiff

In response to grounds (i) and (ii) of the first defendant's application in encl. (7), Encik Gideon Tan, learned counsel for the plaintiff, stressed that the submission for the first defendant in relation thereto was misconceived in that Shah Alam High Court Suit No. MT3-22-1203-1998 as a matter of fact involved an individual as the plaintiff, while the plaintiff in the instant suit is a company which is a separate legal entity and the plaintiff company herein cannot be expected to have full knowledge of all the proceedings in suit MT3-22-1203-1998. It is interesting to interpose here that Cik Gurmeet Kaur Sidhu, learned counsel for the first defendant in her submission in opposing the plaintiff's application in encl. (A41) para. 29 for the present suit and suit MT3-22-1203-1998 to be, heard together, took an identical stand here when Cik Gurmeet Kaur Sidhu submitted to the same effect and went further by saying that the defences pleaded in both the aforesaid suits are also different. It is also pertinent to interpose further that Cik Gurmeet Kaur Sidhu took the firm view that there was no indication that the deponent Koh Kim Chui was affirming his affidavit on behalf of the plaintiff in the other suit MT3-22-1203-1998 and that it was her submission that the present suit had nothing to with the representations allegedly made to the plaintiff in the other suit MT3-22-1203-1998 which relied on the draft account while the present suit concerns the audited account.

Reverting to the submission for the plaintiff herein, Encik Gideon Tan added that in suit MT3-22-1203-1998, it was the failure on the part of the first defendant to reveal the audit working papers in the affidavit verifying list of documents. Further, he argued that false averments were made by one Ravandaran on behalf of the first defendant in relation to the introduction of the library control card in late 1998.

Learned counsel for the plaintiff sought to rebut ground (iii) of the first defendant's application by submitting that the plaintiff has clearly established that there was a real threat that the first defendant would alter, remove and/or destroy the documents, and that indeed there was evidence that the first defendant had in fact altered, doctored and tampered with the documents even before the Anton Piller order was granted.

Decision Of The Court

In considering grounds (i) and (ii) as specifically stated in the first defendant's application in encl. (7) and as further enlarged in para. 5 of the first defendant's affidavit in support in encl. (6), it is to be observed that the plaintiff herein is a company which is a separate and distinct legal entity from the individual shareholders of the company. The Shah Alam High Court Suit No. MT3-22-1203-1998 was commenced by an individual against the first defendant and from the first day it was filed, all proceedings and applications

in that suit and the present one have been conducted distinctly and separately. The plaintiff herein is not a party or privy to suit MT3-22-1203-1998 which was actually handled by M/s Sri Ram & Co who are not the same solicitors for the plaintiff herein. The plaintiff herein was not involved in any of the applications in that suit. In the circumstances, I am unable at this stage to see how these two suits can be treated as one and the same suit. I therefore hold that the plaintiff herein has no duty to disclose what had transpired in suit MT3-22-1203-1998.

As stated above, a strikingly similar stand was taken by Cik Gurmeet Kaur Sidhu, learned counsel for the first defendant in opposing the plaintiff's application in para. 29 of encl. (A41) in which the plaintiff has sought an order to have the present suit and suit MT3-22-1203-1998 heard together. Learned counsel Cik Gurmeet Kaur Sidhu submitted, *inter alia*, as follows:

> The Plaintiffs are different. The Plaintiff in the other suit (MT3-22-1203-1998 is an individual ... The present suit has nothing to do with the representations allegedly made to Datuk Lau (the Plaintiff in the other suit) who relied on the draft account, but the present case concerned the audited account. Lau's case (MT3-22-1203-1998) is based on misrepresentation and has nothing to do with audited accounts.

The only obvious and reasonable conclusion which I can arrive at is the ambivalence of the stand taken by learned counsel for the first defendant in the present suit in these two applications and in para. 29 of the plaintiff's application in encl. (A41). The ambivalent stand taken by learned counsel for the first defendant, in my view, constitutes a self-rebuttal and self-demolition of grounds (i) and (ii) above.

Be that as it may, after an anxious consideration of the letter exhibited in encl. (6) by the first defendant as "RI" and the two orders for discovery granted to the plaintiff in suit No. MT3-22-1203-1998 as "R2 and R3" respectively, I observe that there has been no indication of any compliance therewith by the first defendant, as the first defendant in his affidavit verifying defendant's list of documents had never revealed the audit working papers of the plaintiff herein. Notwithstanding this, the first defendant was yet subscribing to the view that the audit working papers were required in suit MT3-22-1203-1998. The submission of learned counsel for the first defendant was that the present suit has nothing to do with the representations allegedly made to one Datuk Lau (the plaintiff in the other suit MT3-22-1203-1998) who relied on the draft account, but the present suit concerned the audited account such contradiction in the stand taken by or for the first defendant does not assist the first defendant in establishing grounds (i) and (ii) relied upon by the first defendant in encl. (7).

In addressing the issue pertaining to ground (iii) on which the first defendant relied in encl. (7), it is not disputed that the first defendant was in possession of the documents seized pursuant to the Anton Piller order. On the basis of paras. 12 and 13 of the affidavit affirmed by one Koh Kim Chui in encl. (2), 1 am of the view that the plaintiff was justifiably fearful that the first defendant would alter, remove and/or destroy the documents seized. A similar situation prevailed in *Yousif v. Salama* [1980] 3 All ER 405 where the plaintiff Yousif sued the defendant Salama for commission due and owing to him. On a visit to the defendant's premises, the plaintiff was shown two files and a desk diary showing the sum owing to him. Being fearful that the defendant there would destroy these documents before the actual hearing of the case, the plaintiff applied for an Anton Piller order, but was initially refused by the High Court. His appeal was allowed by the Court of Appeal which granted him an Anton Piller order.

In the case before me, not only was the plaintiff's fear amply justified, such fear had also metamorphosed to reality as there were indeed actual instances of the first defendant's alteration, tampering and doctoring of the documents seized, as evidenced below:

(a) In the working papers for the financial year ending 31 May 1996 referenced as L1 in respect of the account for "other debts", a comparison of the doctored working paper L1 followed by a copy of working paper L1 faxed to the plaintiff from the first defendant on 28 May 1998, showed a significant difference between these two working papers, ie, the inclusion of RM4.8 million as owing by Low Leong Huat, a director of the plaintiff company. The first defendant inserted this amount to substantiate the amount of RM5,282,925 of other debtors, deposits and pre-payments account in the balance sheet found in the audited accounts for 1996: (see the audited accounts for 1996 exhibited in encl. (2));

(b) in the working papers for the financial year ending 31 May 1997 referenced as L in respect of the account for "other debtors, deposits and prepayments", a comparison of the doctored working paper L followed by a copy of working paper L faxed to the plaintiff from the first defendant on 28 May 1998 showed a significant difference between the two working papers ie, the exclusion of RM4.8 million under other debtors (CIH). CIH means cash in hand that the plaintiff company is supposed to have at the time. This cash in hand amount was erased and added to the other debtors which hid the RM4.8 million cash in hand;

(c) in the working papers for the financial year ending 31 May 1996 referenced as CC in respect of the account for "other creditors and accruals", a comparison of the doctored working paper CC followed by a copy of working paper CC faxed to the plaintiff from the first defendant on 28 May 1998 showed a significant difference between the two working papers ie, the exclusion of a reconciliation schedule which shows various adjustments or alterations to the books of the plaintiff.

Other instances of alteration, tampering and doctoring of the working paper are set out in the affidavits of Koh Kim Chui, encls. (9) and (22) and would require no further elaboration.

In all the circumstances, after carefully considering all the three grounds as stated in the first defendant's application in encl. (7) in particular, and having regard to the entire written submissions filed by learned counsel for the respective parties herein including those having no nexus with the aforesaid three grounds, I hold that the first defendant's application in encl. (7) is devoid of merits. Consequently first defendant's application in encl. (7) is hereby dismissed with costs.

As alluded to above, a decision in respect of encl. (7) would simultaneously dispose of the plaintiff's application in encl. (10). On the foregoing reasons, I also allow the plaintiff's counter-application in encl. (10) and make an order in terms of all principal prayers with costs. There shall be no order on the alternative prayers.